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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re D.S., a Person Coming Under the
Juvenile Court Law.

ALAMEDA COUNTY SOCIAL
SERVICES AGENCY,

Plaintiff and Respondent,

v.

LINDSEY J.,

Defendant and Appellant.

A155263

(Alameda County
Super. Ct. No. JD024597-03)

Mother, Lindsey J., appeals the juvenile court's order terminating her parental rights to her son, D.S. She contends the trial court abused its discretion in failing to apply the beneficial parental relationship exception. We agree.

BACKGROUND

D.S., born September 2011, was taken from Mother's care and placed into protective custody by the Alameda County Social Services Agency (Agency) in March 2015. He was placed in the care of Tammy T., who is Mother's ex-sister-in-law. The detention occurred after an incident in February 2015 when Mother left D.S. at Project Pride, a drug treatment program where they had been residing almost exclusively since September 2013. Mother admitted using crack cocaine and alcohol several times per

week; she had also been receiving mental health services at Project Pride for anxiety and depression. D.S. appeared to be “developmentally on track and in good health.”

In April 2015, the Agency filed a Welfare and Institutions Code section 300¹ petition alleging that D.S. was subject to the jurisdiction of the juvenile court under section 300, subdivisions (b) and (g). The subdivision (b) allegations were that “The mother admits she has a substance abuse problem with crack cocaine and alcohol. She entered Project Pride with the minor in September 2013 and remained there until she relapsed in February 2015. On or about February 11, 2015, the mother left Project Pride without taking the minor, and did not return for him.”²

The juvenile court ordered D.S. detained. Mother submitted on the allegations of the section 300 petition and the court adjudged D.S. a dependent of the court. The court directed the Agency to provide reunification services.

The Agency’s report for the October 2015 six-month review hearing stated that D.S. was still placed with Tammy T. and recommended continued out of home placement and reunification services. Mother was residing at Orchid Women’s Recovery Center and participating in treatment. She relapsed and used cocaine on a single occasion in June, but she had clean drug tests thereafter. Mother had unsupervised weekly visits with D.S. and participated in parenting classes. She was appropriate during her visits and “provide[d] [him] consistent emotional support.” D.S. was “bonded” to Mother and “often [did] not want the visit[s] to end.” D.S. said he liked living with Tammy but wanted to live with Mother. The juvenile court continued reunification services.

According to family drug court status reports, Mother relapsed in October 2015, was discharged from the Orchid program, and re-entered the program in November. The Agency’s report for the March 2016 12-month review hearing recommend D.S. be

¹ All undesignated statutory references are to the Welfare and Institutions Code.

² The section 300, subdivision (g) allegation was that “The whereabouts, circumstances and ability and willingness of the alleged father to provide care for the minor is unknown.” D.S.’s alleged father was eventually declared the biological and then the presumed father, but he had minimal involvement in the proceedings below and is not involved in the present appeal.

returned to Mother's care in the Orchid program. A progress report from Orchid stated Mother was bonding "exceptionally well" with D.S., who "loves interacting with his mom and their routines." The Agency stated Mother demonstrated "excellent parenting practices when she is sober." The juvenile court returned D.S. to Mother's care.

In a September 2016 status report, the Agency recommended continuation of services. Mother graduated from Orchid's inpatient program in May, but she relapsed on crack cocaine within a week. Mother "immediately" went into a detoxification program and arranged for D.S. to temporarily stay with Tammy. Mother and D.S. moved into another program; she relapsed again on crack cocaine in July but tested clean thereafter. D.S. appeared "to be very bonded with his mother," and he "tells her that he loves her." The juvenile court continued the family maintenance orders.

In October 2016, the Agency reported that Mother relapsed by drinking alcohol in September, but she was not ejected from her treatment program (Terra Firma) or her transitional housing (Life House).

In December 2016, the Agency filed a section 342 subsequent petition alleging new facts showing D.S. is a person described in section 300.³ The petition alleged Mother had been discharged from Life House after relapsing with methamphetamine, alcohol, and cocaine in late November. The petition also alleged that, "in order for [D.S.] to safely reside in [Mother's] care, she must be living in a residential drug treatment facility."

D.S. had been detained following the November 2016 relapse, and Mother told an Agency worker she could no longer care for D.S. due to her relapse and lack of housing. She admitted that on November 25 she relapsed with alcohol in Berkeley and with cocaine and methamphetamine at a park in Oakland. D.S. was with her; Mother's friend (who was under the influence) watched D.S. at the playground while she used drugs in the restroom. Mother moved into the Center Point treatment program and D.S. joined her on December 8.

³ Earlier in the month, the Agency had filed a section 387 supplemental petition based on the same allegations. That petition was withdrawn.

On December 21, 2016, the juvenile court found the allegations of the section 342 petition true and ordered D.S. placed in Mother's care with family maintenance services. The court continued its order in March, May, and August 2017. In its August report, the Agency reported that Mother had a job and was complying with her treatment program and the court's orders. The Agency observed that Mother "demonstrates her ability to understand [D.S.'s] feelings and gives emotional support." The report "acknowledge[d] the family's accomplishments during this reporting period. [M]other has successfully transitioned to a less restrictive living environment. [D.S.] has successfully completed [t]ransitional-[k]indergarten[.] [M]other is encouraged to continue to achieve success."

On January 6, 2018, D.S. was taken into protective custody because on January 5, Mother left D.S. with another treatment program resident and spent the night at a park in Oakland smoking crack and drinking alcohol. She admitted that she had been using crack daily since arriving at the residence in December 2017 and that six months was the longest she had ever stayed "clean."

D.S. appeared "healthy and well-groomed," "emotionally stable and bonded to" Mother, and "developmentally on target." He said he felt safe with Mother.

The Agency filed a section 387 supplemental petition based on the January 2018 incident. The petition sought removal of D.S. from Mother's custody; the juvenile court ordered D.S. detained. The Agency's jurisdiction/disposition report stated that D.S. "is attached to [Mother] and speaks fondly of her." He said he was not able to stay with his mom because she " 'got drunk.' " D.S. and Mother were soon to start weekly supervised visits and had been having daily phone calls.

During a hearing on January 31, 2018, the juvenile court told the biological father, "[D.S.] is incredibly bonded to his mother. I witnessed this personally on many occasions when [Mother] has been in drug court."

A February 2018 Agency report stated that D.S. told Mother he wanted to go with her during a visit that month, and later that month he told an Agency worker he wanted to live with Mother. Mother and D.S. also started having weekly unsupervised visits in February.

The Agency recommended that the court bypass reunification services. At an April 2018 hearing on the section 387 petition, Mother testified she had been residing at Magnolia Women's Recovery Center in Oakland since March 27. She admitted she had actively used drugs after removal of D.S. from her care in January until March 25. She acknowledged her relapses negatively affected D.S., observing "he probably feels abandoned, scared. He doesn't know what's going to happen or where he's going to live, or anything like that." She also acknowledged she had not been able to maintain sobriety for longer than six months since D.S. was born and she had only lived with D.S. in residential treatment. She testified she was participating in many programs at Magnolia that she hoped would be helpful, including programs addressing past trauma. She had been visiting D.S. once a week and speaking with him on the phone every day.

During argument at the April 2018 hearing, D.S.'s counsel agreed with the Agency's recommendation but observed, "I have never once questioned the love that [Mother] has for [D.S.]. I've always thought that she, of all of my clients' parents, is one of the most dedicated and most committed parents to her child."

The juvenile court found the allegations of the supplemental petition true and ordered D.S. removed from parental custody. The court denied reunification services and set a section 366.26 permanency planning hearing for July 24, 2018.

In its report for the section 366.26 hearing, the Agency recommended termination of parental rights and a plan of adoption for D.S. Mother had been having "consistent" weekly unsupervised visits with D.S. He continued "to have a close relationship with" Mother and "wanted to live with her." D.S., who had recently completed kindergarten, was healthy and appeared "developmentally on target," "emotionally stable," "well-adjusted," and "very resilient."

Tammy, who had moved to Maryland, was "very interested in adopting" D.S. She had cared for him for a year when he was around three years old, and she had maintained a relationship with him by calling him on the phone on a weekly basis. D.S. said he wanted to be adopted by "Aunt Tammy" if he could not live with Mother. Tammy was committed to allowing him to maintain a relationship with Mother.

At the section 366.26 hearing on July 24, 2018, Mother testified about her relationship with D.S. and her struggle with substance abuse. Mother was D.S.'s primary caretaker for the first three years of his life, and he also lived with her for most of the dependency proceeding. Mother was not in treatment at the time of the hearing, although she had continued treatment until the previous week without the Agency's assistance and had plans to return to a different treatment program. Mother acknowledged D.S. "worries about" her and she "put him in positions to be not a kid at times." If D.S. were placed with Tammy, Mother planned to move to Maryland once she was stable.

Following the presentation of testimony, counsel for the Agency argued the benefit to D.S. of permanency outweighed the benefit of his relationship with Mother. She argued legal guardianship would leave D.S. "extremely insecure." Counsel observed this was a "wonderful situation" where Tammy was willing to continue the contact between D.S. and Mother; she also stated, "in this particular case we know that Mom will still be able to continue a relationship."

D.S.'s counsel asked the juvenile court to follow the Agency's recommendation but observed she might not have ever "been more conflicted on a case. Mother is an incredible mother I don't think we see that very often in this court." Counsel said D.S. "wants to be with his mom," but adoption "is actual permanence, no matter what, but also still having his relationship with his mother."

Mother's counsel presented a detailed argument why the juvenile court should adopt a permanent plan of legal guardianship based on the beneficial parental relationship exception.

In ruling, the juvenile court said it was a "difficult" case, but observed that D.S. had "paid over and over and over and over again" for Mother's addiction and it "is not fair to him." The court believed "part of" D.S.'s bond with Mother was "very detrimental to him." The court stated, "Does this Court feel that the bond is more important than permanence? No, the Court does not agree that that bond is important than . . . permanence." The court continued, "at this time there is no doubt in the Court's mind, based on the evidence presented today and based on the evidence that's been presented

since the Court took over this case, this child needs the permanency of adoption. And I do not find that the [beneficial parent relationship] exception applies to the extent that this case should be a legal guardian case instead of an adoption case.” The court also commented that D.S. will be “placed with someone who loves him dearly,” he will still know who his mother is, and Mother will still have input in D.S.’s life because Tammy considers Mother to be a sister. The court found there was clear and convincing evidence that it is likely D.S. will be adopted, and it terminated parental rights.

This appeal followed.

DISCUSSION

“At a section 366.26 permanency planning hearing, the juvenile court determines a permanent plan of care for a dependent child, which may include adoption. [Citations.] ‘If the dependent child is adoptable, there is strong preference for adoption over the alternative permanency plans.’ [Citations.] In order to avoid termination of parental rights and adoption, a parent has the burden of proving, by a preponderance of the evidence, that one or more of the statutory exceptions to termination of parental rights set forth in section 366.26, subdivision (c)(1)(A) or (B) apply. [Citations.] The court, ‘in *exceptional circumstances*,’ may ‘choose an option other than the norm, which remains adoption.’ [Citation.] The parental benefit exception applies when there is a compelling reason that the termination of parental rights would be detrimental to the child. This exception can only be found when the parents have maintained regular visitation and contact with the child *and* the child would benefit from continuing the relationship. (§ 366.26, subd. (c)(1)(B)(i).)” (*In re Anthony B.* (2015) 239 Cal.App.4th 389, 394–395.)

“The exception must be examined on a case-by-case basis, taking into account the many variables [that] affect a parent/child bond. The age of the child, the portion of the child’s life spent in the parent’s custody, the ‘positive’ or ‘negative’ effect of interaction between parent and child, and the child’s particular needs are some of the variables [that] logically affect a parent/child bond.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575–576 (*Autumn H.*)). The ultimate inquiry is whether “the relationship promotes the well-being of the child[ren] to such a degree as to outweigh the well-being the child[ren]

would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child[ren] of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Id.* at p. 575.)

"We apply the substantial evidence standard of review to the factual issue of the existence of a beneficial parental relationship, and the abuse of discretion standard to the determination of whether there is a compelling reason for finding that termination would be detrimental to the child." (*In re Anthony B.*, *supra*, 239 Cal.App.4th at p. 395.)

The essential facts of the present case are very similar to those in *In re E.T.* (2018) 31 Cal.App.5th 68, a recent decision from Division Three of this District, that concluded a juvenile court erred in declining to apply the beneficial parental relationship exception. In that case, fraternal twins were removed from their mother's care when they were four months old due to their mother's history of mental health issues and drug addiction, following an incident in which one of the twins was found unresponsive on the mother's living room couch. (*Id.* at p. 71.) The twins were returned to the mother's care after more than a year of reunification services, but more than a year later the mother told her social worker that she had relapsed into drug use and needed help. (*Ibid.*) The mother agreed to temporarily place the children with their godparents. (*Ibid.*)

Several months later, mother was still using drugs. (*In re E.T.*, *supra*, 31 Cal.App.5th at p. 71.) A supplemental petition was filed, and the juvenile court bypassed reunification services to the mother because she had previously been provided services and failed to reunify. (*Ibid.*) The mother had weekly supervised visits with the twins and spoke to them on the phone once or twice a week. (*Id.* at pp. 72, 74.) The twins loved their mother, and she provided them with "comfort and affection." (*Id.* at p. 72.) Nevertheless, the juvenile court declined to apply the beneficial parental relationship exception and terminated parental rights. The court observed that the twins "had lived 24

months with the godparents and only 22 months of their lives with [the m]other, some of [the m]other's visits with the children had been difficult, and 'although they are very tied to their mother, it's not to such an extent that they can't be happy in their godparents' placement.' ” (*Id.* at p. 75.)

The court of appeal concluded the juvenile court erred. First, the court noted “There is no question here that [the m]other fulfilled the first component of the beneficial relationship exception. She visited with the children as often as she was permitted by the social workers, and she also had regular contact with the children by phone in between visits.” (*In re E.T.*, *supra*, 31 Cal.App.5th at p. 76.) The same is true in the present case. It is clear that, throughout the dependency, Mother maintained regular visitation and contact with D.S. The Agency agrees.

Turning to the second required factual showing, the *In re E.T.* court stated, “More importantly, the visits coupled with [the m]other's efforts during the dependency showed that the children would benefit from continuing their relationship with her. They love [their m]other. She provided them comfort and affection, and she was able to ease their fear and anxiety. . . . While the Agency thought [the m]other should always be a presence in the children's lives, it favored termination of her parental rights because the children needed stability and the godparents could provide it.” (*Id.* at p. 76.) The court of appeal also observed that the mother had continued to participate in treatment despite denial of services and had acknowledged “her behavior was traumatic for the children.” (*Id.* at p. 77.) All of that is true in the present case as well. The evidence below uniformly demonstrated the strength of the bond between Mother and D.S., the quality of the visitation, and Mother's parenting abilities when she was sober. Accordingly, while it is unclear whether the juvenile court found D.S. would not benefit from continuing his relationship with Mother, any such finding would be error.

The final and most complicated question is whether the juvenile court abused its discretion in concluding the relationship between Mother and D.S. did not “constitute[] ‘a compelling reason for determining that termination would be detrimental to the child.’ ” (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 647.) The court of appeal in *In re E.T.*

found such an abuse of discretion, reasoning “There is no question that the twins have a substantial and positive attachment to [the m]other such that terminating their familial relationship would cause them great harm. Even if [the m]other may not ultimately regain custody, she should not be excluded from the children’s’ lives.” (*Id.* at p. 77.) The same is true in the present case. Indeed, Mother cared for D.S. far longer than the mother in *In re E.T.* cared for the twins: While the twins in *In re E.T.* were removed from the mother’s care at four months, in the present case Mother cared for D.S. the first three years of his life and during much of the dependency proceeding.⁴ Accordingly, also taking into consideration the overwhelming evidence of the strength of the bond between Mother and D.S., Mother in the present case made an even greater showing that termination of parental rights would deprive D.S. of “a substantial, positive emotional attachment.” (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

The Agency argues *In re E.T.* is distinguishable because, while the mother in that case only relapsed once, the record shows that “Since 2013, Mother was in a repeated cycle of engaging with inpatient treatment, relapse, and detoxification. [Citations.] [D.S.] was only formally removed from Mother’s care twice, from March 2015 and returned in March 2016, [citations] and then removed again in January 2018. [Citation.] However, there were other times that Mother relapsed and got directly back into treatment and the minor was informally staying with his caregiver, Tammy. . . . Mother admitted that during the time the case was open, Mother was never sober for longer than six months at a time.” The Agency is correct the record shows a consistent pattern of relapses, which means that Mother is unlikely to reunify with D.S. absent dramatic and very sustained life changes on her part. However, the Agency cites no authority the

⁴ The Agency points out that “since the time the minor was approximately two years old, Mother had only had custody of the minor while at an inpatient substance abuse program.” While that is relevant in determining whether D.S. can safely be returned to Mother’s custody, the Agency fails to explain how that is relevant to assessing the strength of Mother’s bond with D.S. (See *In re Caden C.* (2019) 34 Cal.App.5th 87, 108 [“While it is true that [the minor] lived with mother in residential treatment . . . , mother was primarily caring for [his] day-to-day needs, albeit in a supervised setting.”].)

likelihood of reunification is a consideration in application of the beneficial parental relationship exception. Accordingly, even though arguably Mother has lesser prospects for reunification than the mother in *In re E.T.*, that is not a meaningful basis to distinguish the case.

The Agency also points to Mother's acknowledgement that, in the words of the Agency, D.S. "had been adversely affected by her pattern of relapse."⁵ The juvenile court focused on the same issue in announcing its decision, stating "I agree . . . they're bonded, but part of that bond is very detrimental to [D.S.]. Does he worry about her? Where is she? What is she doing? I've seen him be more of the—not the adult, but the caretaker in this relationship. And he never knows when Mom is going to fall again. And she has, time and time again. When is that going to stop? We don't know when it's going to stop." That analysis fully supports the juvenile court's decision to deny reunification services, but it is a problematic basis by itself to deny application of the beneficial parental relationship exception. If a juvenile court is at the point of considering application of the exception, the parent has, *by definition*, repeatedly failed the child and shown themselves incapable of having custody of the child. To construe the exception as inapplicable to parents who have a pattern of disappointing their children would be to write the exception out of the statute.⁶

⁵ Mother disputes the Agency's characterization of her testimony on the point, but it is almost beyond dispute that D.S. has been adversely affected by Mother's pattern of relapses. We also observe that Mother complains in her reply brief on appeal that "the Agency 'set [her] up' . . . by allowing relapse after relapse during family maintenance and then in the end arguing that [D.S.] was harmed by the repeated relapses." We unequivocally reject that perspective. A child welfare agency does not, by giving a parent additional opportunities to reunify, forfeit an argument that a minor was negatively impacted or put at risk by relapses. Child welfare agencies are required to make many difficult judgment calls during dependency proceedings and they should not be concerned that decisions showing parents leniency will interfere with their ability to make recommendations if parents fail to reunify.

⁶ Although the juvenile court's ruling is ambiguous, it appears the court, as well as the Agency and D.S.'s counsel, may have been influenced by Tammy's intent to maintain a relationship between Mother and D.S. The *In re E.T.* court was confronted by a similar situation and observed, "Perhaps, given the longstanding relationship between [the

On the other hand, we do recognize the circumstances underlying the failure to reunify are a legitimate consideration. A recent decision from Division One of this District, *In re Caden C.*, *supra*, 34 Cal.App.5th 87, is instructive. That was “one of the rare and difficult cases in which the juvenile court’s application of the beneficial relationship exception amounted to an abuse of discretion.” (*Id.* at p. 110.) There, the court of appeal considered the mother’s failure to maintain her sobriety and address her mental health issues, noting “mother failed to engage in her case plan or seek treatment of any kind in the 10 months leading up to the permanency hearing, was actively abusing drugs again, and was in denial about her ability to parent under the influence of methamphetamine.” (*Id.* at p. 112.) Thus, the *In re Caden C.* court treated the mother’s underlying failures as important to the decision whether to apply the beneficial parental relationship exception. The court of appeal compared the case to others where parents were not “actively involved in maintaining their sobriety or complying substantially with their case plan.” (*Id.* at p. 112.) In the present case, Mother *has* continued to seek treatment and shown insight into her drug use.

Moreover, the *In re Caden C.* decision did not rely exclusively on the mother’s substance abuse, but also on the way that her substance abuse manifested itself in her relations with her son and his caregivers. For example, in that case foster placement was the “only remaining alternative” to adoption, and foster placement “had already proved itself destabilizing, with [the minor] removed from four different homes due to [the]

m]other and the godparents, the court considered that the children may have contact with [the m]other even though her rights were terminated. But ‘the court cannot nevertheless terminate parental rights based upon an unenforceable expectation that the prospective adoptive parents will voluntarily permit future contact between the child and a biological parent, even if substantial evidence supports that expectation. The purpose of the parent-child relationship exception is to protect the parent-child relationship when its continuation is more beneficial to the dependent child than a permanent plan of adoption and, in such a case, a court cannot leave the protection of such a relationship dependent upon the hoped-for goodwill of the prospective adoptive parents.’ ” (*In re E.T.*, *supra*, 31 Cal.App.5th at p. 78.) Mother argues on appeal the juvenile court erred by relying on Tammy’s intent to continue the relationship between Mother and D.S., but we need not address that contention because we reverse on other grounds.

mother's constant interference and efforts to undermine the foster families.” (*In re Caden C.*, *supra*, 34 Cal.App.5th at p. 113.) The court also observed in a prior decision in the same proceeding that “ ‘mother consistently fueled [the minor's] belief that he would soon return home, a belief that was unrealistic given mother's inability to cease using methamphetamine, and one that fostered anxiety in the minor and that undermined placement after placement.’ ” (*Ibid.*) Furthermore, the minor in *In re Caden C.* was “a developmentally vulnerable child with a diagnosis of PTSD” who was at “ ‘exponentially higher risk’ for future psychiatric problems.” (*Id.* at p. 114.) Finally, the mother was inappropriate during visitations: The social worker described the relationship with the minor as “ ‘toxic’ . . . in which the ‘child is unable to separate from [mother] due to a high level of concern about her well-being’ and he is ‘exposed to conversations that cause fear and create behaviors that jeopardize his safety, emotional well-being, and education.’ ” (*In re Caden C.*, *supra*, 34 Cal.App.5th at p. 114.) The Agency points to nothing in any way comparable in the present case.

The *In re Autumn H.* decision directs juvenile courts to consider “[t]he age of the child, the portion of the child's life spent in the parent's custody, the ‘positive’ or ‘negative’ effect of interaction between parent and child, and the child's particular needs” in deciding whether to apply the beneficial parental relationship exception. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575–576.) In the present case, the juvenile court's oral decision does not reflect consideration of those factors, and the Agency on appeal fails to explain how those or other factors show Mother and D.S. lack “a substantial, positive emotional attachment.” (*Id.* at p. 575; see also *In re Caden C.*, *supra*, 34 Cal.App.5th at p. 113 [“In the absence of any explanation, we look to the evidence as a whole to ascertain if it supports the juvenile court's determination.”].) Despite Mother's regular relapses into substance abuse, the record demonstrates an uncommon consensus that she was extremely loving and appropriate in all her interactions with D.S. (other than, of course, the incidents where her drug use resulted in neglect, which is why she does not have custody). Because the juvenile court relied on Mother's relapses, rather than any information about the “strength and quality of the

natural parent/child relationship” (*ibid.*), the court abused its discretion in denying application of the beneficial parental relationship exception and terminating parental rights.⁷

DISPOSITION

The order terminating Mother’s parental rights and freeing D.S. for adoption is reversed. The case is remanded for the juvenile court to adopt a long-term plan for D.S. in accordance with section 366.26(c)(4).

⁷ In her opening brief on appeal, Mother asserted a claim for failure to comply with the Indian Child Welfare Act, but she withdrew the claim in her reply brief.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.

(A155263)

